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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 39.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* EDWARD AND JOHN BURKE, LIMITED, PLAINTIFF IN ERROR,

vs.

JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER AND RUFUS L. SCOTT, AS COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MAY 24, 1906.

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(20,266.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 302.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* EDWARD AND JOHN BURKE, LIMITED, PLAINTIFF IN ERROR,

vs.

JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER AND RUFUS L. SCOTT, AS COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capital, in the City of Albany, on the 13th day of March, in the year of our Lord one thousand nine hundred and six, before the Judges of said Court. Witness The Hon. Edgar M. Cullen, Chief Judge, Presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, March 14th, 1906.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* EDWARD and JOHN BURKE, LIMITED, Appellant,
ag'st
JAMES L. WELLS and Others, as Commissioners of Taxes, etc., Respondents.

Be it remembered, that on the 18th day of September in the year of our Lord one thousand nine hundred and five Edward and John Burke, Limited, the appellant in this proceeding came
b here into the Court of Appeals, by Wetmore and Jenner, attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And James L. Wells and others as Commissioners of Taxes etc., the respondents, in said proceeding afterwards appeared in said Court of Appeals by John J. Delany, Corporation Counsel, their attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Edmund Wetmore of counsel for the appellant, and by Mr. George S. Coleman of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return
c thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to

law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March 14th*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

d Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Relator-Appellant,

vs.

JAMES L. WELLS ET AL., as Commissioners of Taxes and Assessments, etc., Respondents.

Papers on Appeal from Order Confirming Assessment.

Wetmore & Jenner, Attorneys for Appellant, 34 Pine Street, New York City.

John J. Delany, Corporation Counsel, Attorney for Respondent, 2 Tryon Row, New York City.

1 *Petition for Writ of Certiorari.*

To the Supreme Court of the State of New York:

The petition of Edward & John Burke, Limited, respectfully shows to the Court:

That your petitioner is and has been since the year 1893 a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland, and an office in the Borough of Manhattan, City of New York.

That your petitioner has obtained from the Secretary of State of the State of New York a certificate authorizing it to do business in this State pursuant to statute in such case made and provided.

That on January 1st, 1903, and at all the times subsequent thereto, James L. Wells, William S. Coggswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott were Commissioners of Taxes and Assessments for the City of New York, and constituted a Board of Taxes and Assessments in and for the City of New York, and said James L. Wells was President of said Board of Taxes and Assessments in and for said city.

Your petitioner further shows that on or about the 12th day of January, 1903, the personal estate of your petitioner was assessed

by the Commisioners of Taxes and Assessments, for the purposes of taxation for the year 1903, at a valuation of one hundred and fifty thousand dollars ($150,000), and that such assessed valuation was entered in the books required to be kept by the Board of Taxes and Assessments, called the Annual Record of the Assessed Valuation of Real and Personal Estate of the Borough of Manhattan.

That thereafter, and subsequent to the second Monday of January, 1903, and prior to the first day of May, 1903, as re-
2 quired by law, your petitioner, being aggrieved by the said assessed valuation of said personalty, duly made application to said Commissioners, at their main office in the Borough of Manhattan, to have the same corrected, by filing with the said Commissioners of Taxes and Assessments a duly verified statement in writing, in the form provided for and required by said Commissioners, and that in such statement the items showing the amount of capital invested by your petitioner in the State of New York on the second Monday of January, 1903, were set out in full, as was the nature of the business transacted by your petitioner. A copy of said statement is hereto annexed, marked "Schedule A," and made a part of this petition.

That thereafter the said Board of Taxes and Assessments caused to be prepared from the said books of Annual Record of Assessed Valuation of Real and Personal Estate, assessment rolls for each of the boroughs in said city, including the Borough of Manhattan, and having completed and certified the same as correct, they delivered the same to the Board of Aldermen on or about the 3d day of July, 1903, and gave public notice on said day of the completion and delivery of said assessment rolls and of the place where and the time when said assessment rolls would be open to public inspection, as required by law.

That in and by said assessment rolls as finally completed, the said Commissioners of Taxes and Assessments have assessed your petitioner on such personalty aforesaid upon a valuation of ninety-four thousand six hundred dollars ($94,600).

That said Board of Aldermen is about to proceed thereon in the manner required by law for the levying and collection of taxes.

Your petitioner further shows that the said assessment is erroneous by reason of over-valuation to the extent of $93,802.32, and that your petitioner is and will be injured thereby.

Your petitioner further shows that the said assessment is illegal in the following particulars:

3 First. That on said second Monday of January, 1903, the amounts receivable on notes and open accounts due your petitioner by its customers was $111,751.53, and that your petitioner had cash on hand and in bank amounting to $6,122.63. That the entire amount of said bills receivable and cash on hand and in bank resulted from and was the proceeds of sales by your petitioner of imported goods in unbroken original packages upon which your petitioner paid duties to the Government of the United States; that in the said assessment of personalty, the amount of said bills receiv-

able and cash on hand and in bank, viz., $117,874.16, was included among the assets of said corporation in this State contrary to law and the provisions of the Constitution of the United States.

Second. That on said second Monday of January, 1903, your petitioner had no capital invested in its business in the State of New York as personal property, except the sum of $797.68, and that said sum of $797.68 should have been the assessed valuation.

That no previous application has been made for this order.

Wherefore, your petitioner prays that a writ of certiorari may be issued and allowed by this Honorable Court, directed to James L. Wells, president; William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, Commissioners of Taxes and Assessments, constituting the Board of Taxes and Assessments of the City of New York, commanding them to return and certify to this Court all proceedings, books, papers, records, documents, memoranda and things relative and pertaining to their action in the premises, or in any wise having respect thereto, and by what authority or claim to authority they have made said assessment, and that the decision and acts of said Commissioners and their errors aforesaid be reviewed upon the merits according to law, and that a reassessment of the property of your petitioner and a correction and reduction
4 of said assessment be made according to law, and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

EDWARD & JOHN BURKE,
LIMITED,
By COURSEN H. KING, *Agent.*
WETMORE & JENNER,
Attorneys for Petitioner, 34 Pine Street, New York City.

STATE OF NEW YORK,
City of New York, County of New York, ss:

Coursen H. King, being duly sworn, says: I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge, except the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason why this affidavit is not made by petitioner is that petitioner is a foreign corporation. Said petitioner has its principal place of business in this country in the Borough of Manhattan, City, County and State of New York, and I am and for many years have been the managing agent in this country for said petitioner, and have charge of said office, and as such managing agent have been and am familiar and conversant with all the business of the petitioner in this country.

COURSEN H. KING.

Sworn to before me this 30th day of October, 1903.
[SEAL.] JOHN F. RAFFERTY,
Notary Public, New York County.

5 "SCHEDULE A.".

The City of New York, Department of Taxes and Assessments.

Main Office, 280 Broadway, Borough of Manhattan.

Edward & John Burke, Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, by Coursen H. King, the agent of said corporation, claiming to be aggrieved by the assessed valuation of its personal property for the year 1903, makes application to have the same revised and corrected.

Dated February 28th, 1903.

EDWARD & JOHN BURKE, L'T'D,
By COURSEN H. KING.

Statement for Purpose of Revision.

Edward & John Burke, Limited, is a corporation organized under the laws of the Kingdom of Great Britain and Ireland.

The company has an office at No. 409 West 14th Street, in the City of New York, Borough of Manhattan.

Amount of capital for which company is organized, £1,100,000.

1. The business of the corporation proposed to be carried on within the State, stated in its application under the provisions of Chapter 687 of the Laws of 1892, was importers.

2. The place within the State named as its principal place of business was 409 West 14th St., N. Y. City.

3. The corporation transacts business within this State at the following places: 409 West 14th St., N. Y. City.

6 The following items are true statements showing the amount of capital invested in business by the company in the State of New York on the second Monday of January, 1903:

4. The amount receivable on notes and open accounts was $111,751.53.

5. The value of goods, wares and merchandise in the State of New York was $45,841.21.

6. The value of machinery and plant in the State of New York was —.

7. The value of safes, fixtures and furniture in the State of New York was $797.68.

8. Cash on hand and in bank was $6,122.63.

9. Cost price of imported goods on hand in unbroken original packages was $45,841.21.

10. The amount of bills and accounts payable incurred for items included in the sales and assets above enumerated was $24,053.91.

The amount invested in business in the State of New York was (as shown by Exhibit A hereto attached) $797.68.

Amount of indebtedness contracted or incurred in the purchase of non-taxable property or securities, or for the purpose of evading taxation —.

The company is assessed by the State Comptroller for $124,000.00.

THE CITY OF NEW YORK, *ss:*

I, Coursen H. King, the agent of the said corporation, being duly sworn, do hereby certify that the foregoing is in all respects a just and true statement of the property invested in business in the State and of the debts of the corporation arising out of such business on the second Monday of January, 1903.

COURSEN H. KING.

Sworn to before me this 28th day of February, 1903.

LEWIS L. PIERCE,
Notary Public (37) *City and Co. New York.*

7 "EXHIBIT A."

Edward & John Burke, Limited, is a corporattion organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland. It is engaged in the business of manufacturing, bottling and selling various liquors and beverages, such as whiskey, stout, etc. It keeps a wareroom and offices in the Borough of Manhattan, to which it sends its products from Ireland in unbroken original packages to be sold. On all these goods it pays duties to the United States. The proceeds of the sales of the goods are at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in the City of New York.

The value of the goods on hand as shown by the annexed statement, is about the average amount of the goods usually kept here for sale.

The greater part of the cash on hand and in bank was in process of transmission to the main office. The bank account is, to a very large extent, kept to cover the payment of duties on the goods shipped here for sale.

The entire amount of bills receivable results from sales of imported goods in unbroken original packages, as does the cash on hand in bank.

No other business is transacted by the corporation in this State, than the sale of its products and the collection and remittance of the proceeds from the same as above stated.

The corporation has procured a certificate authorizing it to do business in this State.

8 *Order for Writ of Certiorari.*

At a Special Term of the Supreme Court, Part II. thereof, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 30th day of October, 1903.

Present: Hon. Edward E. McCall, Justice.

In the Matter of the Application of EDWARD & JOHN BURKE, LIMITED, for a Writ of Certiorari to Review the Action of the Board of Taxes and Assessments of the City of New York.

On reading and filing the annexed petition of Edward & John Burke, Limited, verified the 30th day of October, 1903, and on motion of Wetmore & Jenner, attorneys for the said petitioner, it is

Ordered that a writ of *certiorari* to review the action of the Board of Taxes and Assessments of the City of New York be issued as prayed for in the said petition, directed to James L. Wells, President, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, Commissioners of Taxes and Assessments, constituting the Board of Taxes and Assessments of the City of New York, commanding them to return and certify to the Supreme Court, at a Special Term, Part III. thereof, to be held at the County Court House in the Borough of Manhattan, City of New York, on the 16th day of November, 1903, at the opening of Court on that day
9 or as soon thereafter as counsel can be heard, upon oath, the original or copies of all the books, papers, records, documents memoranda and things relative to the allegations in said petition contained, and especially such as were before them or pertaining to their decision or action in relation to the valuation and assessment referred to in said petition, namely: an assessment of ninety-four thousand six hundred dollars ($94,600), by them lately made upon personalty belonging to Edward & John Burke, Limited, having an office at No. 409 West Fourteenth street, in the Borough of Manhattan, City and State of New York, and whereby they, the said commissioners, finally affirmed said assessment, together with any application made by said Edward & John Burke, Limited, for a reduction in said assessment upon the said personalty, and all reports made by said corporation, and the action of said Commissioners and their decision thereon, and the grounds thereof, and the dates of all said papers, matters and proceedings, together with the authority or claim to authority under which they have made such assessment or valuation.

And the said Commissioners are directed to serve upon Wetmore & Jenner, relator's attorneys, a copy of said return ten days after service of said writ, and let the Clerk of this Court allow, sign and seal said writ, and let the same be served upon said commissioners at least ten days before the return day thereof.

The Court hereby in its discretion dispenses with notice of the application for the writ in this matter.

Enter.

EDWARD E. McCALL, *J. S. C.*

10 *Writ of Certiorari.*

The People of the State of New York, to James L. Wells, President; William S. Cogswell, George J. Gillespie, Samuel Strasbourger, and Rufus L. Scott, Commissioners of Taxes and Assessments, constituting the Board of Taxes and Assessments in and for the City of New York, Greeting:

Whereas, we have been informed by the petition duly verified of Edward & John Burke, Limited, a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland, and an office in the Borough of Manhattan, in the City of New York; that certain proceedings have been recently had by or before the Board of Taxes and Assessments touching the assessment and taxation of the personal estate of Edward & John Burke, Limited, for the year 1903, and that the above-mentioned personal estate has been assessed for the purpose of taxation for the year 1903, against said Edward & John Burke, Limited, at a valuation of $94,600, which was entered on the annual record of the assessed valuations of real and personal estate of said Borough of Manhattan; that Edward & John Burke, Limited, being aggrieved by the valuation aforesaid duly made application to have the same corrected, duly stating under oath its grounds and objections thereto; that its objections were disallowed and on the assessment rolls thereafter prepared from the said books of annual record and delivered to the Board of Aldermen as required by law, the said Commissioners have assessed the personal estate aforesaid against the petitioner at a valuation of $94,600; that said assessment upon the said valuation of said personal estate is illegal and erroneous by reason of over-valuation, and that the petitioner will be injured by such erroneous assessment.

And we being willing for certain causes to be certified of said proceedings, decisions and action had by and before you and
11 for the books, papers, records, documents, memoranda and all things before you or pertaining to the said application for a correction and reduction of said assessment and to your decision and action in the premises and to the valuations and assessments aforesaid and the dates thereof, and by what authority or claim to authority you have made such assessment or valuation and a proper cause for the issuing of this writ having been shown.

Now, therefore, we command you that all and singular the said proceedings, decisions and actions in the premises, with the dates thereof respectively, and all and singular the documents, memoranda, books, papers, records and things made, touching or concerning the valuation of assessment or taxation of the personal estate of the said Edward and John Burke, Limited, or in any wise having respect thereto, and all and singular the documents, memoranda, books, papers and records before you touching or concerning the same, together with the authority or claim to authority under which you have made such assessment or valuation, together with any applica-

tion made by said Edward and John Burke, Limited, for a reduction in said assessment upon said personalty, and your action and decision thereon, and the dates of any and all papers, matters and proceedings you certify, and send to a Special Term of our Court to be held in and for the County of New York, at the County Court House in said county, on the 16th day of November, 1903, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, together with this writ, to the end that your proceedings, decisions and actions in the matter of said assessment, and that the assessment of the aforesaid personal estate of said Edward and John Burke, Limited, may be reviewed on the merits and vacated or corrected by our said Court, and that we may further cause to be done thereupon what is right and according to law ought to be done.

WITNESS: The Honorable Edward E. McCall, Justice of the Supreme Court of the First Department at the County Court
12 House, in the Borough of Manhattan, in the City of New York, on the 30th day of October, 1903.

By the Court,

[SEAL.] THOS. L. HAMILTON, *Clerk.*

Return to Writ.

Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EDWARD & JOHN BURKE, LIMITED, Relator,
against
JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants.

Taxes of 1903.

To the Supreme Court of the State of New York:

We, James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, Commissioners of Taxes and Assessments of the City of New York, respectfully return to the writ of *certiorari* hereto prefixed and issued out of this Court on the 30th day of October, 1903, as follows:

We are Commissioners of Taxes and Assessments of The City of New York.

Between the first Monday of September, in the year 1902, and the second Monday of January, 1903, the Deputy Tax Com-
13 missioners of the City of New York, under our direction assessed all the taxable property in the several districts of said city that were assigned to them respectively for that purpose, and furnished to us, under oath, a detailed statement of all such property, showing that said deputies have personally examined each and every house, building lot, pier or other assessable property, giving the street, lot, ward, town and map number of such real estate em-

braced within said districts, together with the name of the owner or occupant, if known; also, in their judgment, the sum for which such property under ordinary circumstances would sell, with such other information in detail, relative to personal property or otherwise, as we from time to time required; and the assessed valuations so made of all such property within The City of New York were duly entered in detail in books provided for that purpose, and kept in the several offices established by the Department of Taxes and Assessments in the several Boroughs of said city, called "The Annual Record of Assessed Valuation of Real and Personal Estate."

The Deputy Tax Commissioner assigned to that duty, under our direction, between said times duly assessed the capital of the relator invested in business in this State for the year 1903, at the sum of $150,000, and duly entered such assessment in the "Annual Record of the Assessed Valuations of Real and Personal Estate of Corporations."

The said books were kept open in our office for examination and correction, from the second Monday of January, 1903, until the first day of April, 1903, and previous to and during the time said books were open for inspection the fact was duly advertised according to law. During the time said books were open to public inspection, as above stated, the said relator submitted to us, and filed in our office, a statement in writing, of which a copy marked "Exhibit A" is hereto attached and made part of this return. Thereupon we examined into the statement made by the relator, and after due consideration fixed the assessment at the sum of $94,600, which
14 we believed to be just, and which we decided to be the sum for which said relator was lawfully assessable for the year 1903, and thereupon said assessment theretofore entered in said books of annual record was reduced in accordance with our decision.

Thereafter, we caused to be duly prepared from said books of annual record, assessment rolls for each of the several Boroughs of the said city, and annexed to each of said rolls our certificate that the same was correct, in accordance with the entries in said books of record, and on the first Monday of July, 1903, the rolls thus certified were delivered by us to the Board of Aldermen of the City of New York, at the City Hall in the Borough of Manhattan in said city.

We further return that the method by which we made the said assessment for the purpose of taxation for the year 1903, was as follows:

On the statement submitted to us ("Schedule A") it appeared that the relator was a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that it had procured a certificate authorizing it to do business in this State, that the business of the corporation proposed to be carried on within this State, stated in its application under the provisions of Chapter 687 of the Laws of 1892, was importers, that the place within the State named in said application as its principal place of business was 409 West Fourteenth street, that the company transacted business within this State at No. 409 West Fourteenth street, in the City of New York, Borough

of Manhattan, and that the company was assessed by the State Comptroller for $124,000.

It further appeared that the relator kept a wareroom and offices in the Borough of Manhattan to which it sent its products from Ireland in unbroken original packages to be sold, that on all these goods it paid duties to the United States, that the proceeds of the goods were at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in the City of New York, that the value of the goods on
15 hand, as shown in the statement, was about the average amount of the goods usually kept here for sale, that the greater part of the cash on hand and in bank was in process of transmission to the main office, that the bank account was to a very large extent kept to cover the payment of duties on the goods shipped here for sale, and that the entire amount of bills receivable resulted from the sales of imported goods in unbroken original packages, as did the cash on hand and in bank.

The amount receivable on notes and open accounts was stated to be	$111,751 53
The value of goods, wares and merchandise in this State	45,841 21
The value of safes, fixtures and furniture in this State.	797 68
Cash on hand and in bank	6,122 63
Cost price of imported goods on hand in unbroken original packages	45,841 21
Amount of bills and accounts payable incurred for items included in the sales and assets enumerated	24,053 91

It was admitted that the amount invested in business in this State was $797.68, which was the value of relator's safes, fixtures and furniture in this State.

From all this evidence we determined that the relator had on the second Monday of January, 1903, established and was conducting a permanent and continuous business in this State.

We further determined that the amount receivable on notes and open accounts, and the cash on hand and in bank constituted capital of the relator invested in its business in this State, and that such items were properly assessable by us. We accordingly fixed the assessment against the relator for the year 1903 for capital invested in business in this State at the sum of $94,600, which amount was approximately the aggregate value of the amount receivable on notes and open accounts, the safes, fixtures and furniture in this State, and the cash on hand and in bank, less the amount of
16 bills and accounts payable incurred for the items included in the sales and assets enumerated in said statement.

Referring to the petition herein and answering the allegations therein contained, on information and belief we deny that the said assessment is erroneous by reason of over-valuation, or that the relator is or will be injured by said assessment, or that said assessment is illegal for any reason whatsoever, or that the amount of said

bills receivable and cash on hand and in bank, $117,874.16, was included among the assets of the relator in this State, contrary to law or to the provisions of the Constitution of the United States, or that on the second Monday of January, 1903, the relator had no capital invested in its business in this State, except the sum of $797.68, or that the said sum of $797.68 should have been the assessed valuation of relator's capitol invested in business in this State.

With regard to the statements contained in said writ, and the petition upon which the same was granted, to the effect that said assessment was erroneous by reason of over-valuation, or is unequal in that it was made at a higher proportionate valuation than other real or personal property on the same rolls, or that the said assessment, upon any of the grounds specified in said petition, is illegal, erroneous or void, we certify and return, upon information and belief, that each and every of such statements is untrue.

In witness whereof, we have hereunto subscribed our names, this 18th day of December, 1903.

WILLIAM S. COGSWELL,
GEORGE J. GILLESPIE,
RUFUS L. SCOTT,
Commissioners of Taxes and Assessments.

COUNTY OF NEW YORK, *ss:*

William S. Cogswell, George J. Gillespie and Rufus L. Scott, being severally duly sworn, say, and each for himself says,
17 that the foregoing return is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM S. COGSWELL.
GEORGE J. GILLESPIE.
RUFUS L. SCOTT.

Sworn to before me this 18th day of December, 1903.
CHAS. H. WOODHULL,
Notary Public (*No.* 104), *New York County.*

EXHIBIT "A."

Edward & John Burke, Limited, is a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland. It is engaged in the business of manufacturing, bottling and selling various liquors and beverages, such as whiskey, stout, etc. It keeps a wareroom and offices in the Borough of Manhattan, to which it sends its products from Ireland in unbroken original packages to be sold. On all these goods it pay duties to the United States. The proceeds of the sales of the goods are at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in the City of New York.

The value of the goods on hand as shown by the annexed statement, is about the average amount of the goods usually kept here for sale.

The greater part of the cash on hand and in bank was in process of transmission to the main office. The bank account is, to a very large extent, kept to cover the payment of duties on the goods shipped here for sale.

The entire amount of bills receivable results from sales of imported goods in unbroken original packages, as does the cash on hand and in bank.

No other business is transacted by the corporation in this State, than the sale of its products and the collection and remittance
18 of the proceeds from the same as above stated.

The corporation has procured a certificate authorizing it to do business in this State.

The City of New York, Department of Taxes and Assessments.

Main Office, 280 Broadway, Borough of Manhattan.

The Edward & John Burke, Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland by Coursen H. King, the agent of said corporation, claiming to be aggrieved by the assessed valuation of its personal property for the year 1903, makes application to have the same revised and corrected.

EDWARD & JOHN BURKE, L'T'D,
By COURSEN H. KING.

Statement for Purpose of Revision.

The Edward & John Burke, Limited, is a corporation organized under the laws of the Kingdom of Great Britain and Ireland.

The company has an office at 409 West Fourteenth street, in the City of New York, Borough of Manhattan.

Amount of capital for which company is organized, £1,100,000.

1. The business of the corporation proposed to be carried on within the State, stated in its application under the provisions of Chap. 687 of the Laws of 1892, was importers.

2. The place within the State named as its principal place of business was 409 West Fourteenth street.

3. The corporation transacts business within this State at the following place: 409 West Fourteenth street.

19 The following items are true statements showing the amount of capital invested in business by the company in the State of New York on the second Monday of January, 1903:

4. The amount receivable on notes and open accounts was $111,751.53.

5. The value of goods, wares and merchandise in the State of New York was $45,841.21.

6. The value of machinery and plant in the State of New York was —.

7. The value of safes, fixtures and furniture in the State of New York was $797.68.

8. Cash on hand and in bank was $6,122.63.

9. Cost price of imported goods on hand in unbroken original packages was $45,841.21.

10. The amount of bills and accounts payable incurred for items included in the sales and assets above enumerated was, as shown by Exhibit "A" hereto attached, $24,053.91.

The amount invested in business in the State of New York was $797.68.

Amount of indebtedness contracted or incurred in the purchase of non-taxable property or securities, or for the purpose of evading taxation —.

The company is assessed by the State Comptroller for $124,000.00.

THE CITY OF NEW YORK, *ss:*

I, Coursen H. King, the Agent of the said corporation, being duly sworn, do hereby certify that the foregoing is in all respects a just and true statement of the property invested in business in the State and of the debts of the corporation out of such business on the second Monday of January, 1903.

COURSEN H. KING.

Sworn to before me this 28th day of February, 1903.

LEWIS L. PIERCE,
Notary Public (3), *City and Co. of New York.*

20 This cause having been regularly reached and called upon the calendar was argued before Mr. Justice Leventritt, sitting at Special Term, Part III, in the County Court House, in the Borough of Manhattan, City of New York, on the 23rd day of May, 1904. Thereafter the Court made the following order:

Order Quashing Writ.

At a Special Term, Part III, of the Supreme Court, held in and for the County of New York at the Court House in said County, on the 20th day of June, 1904.

Present: Hon. David Leventritt, Justice.

PEOPLE *ex Rel.* EDWARD and JOHN BURKE, L'T'D, Relators,
against
JAMES L. WELLS and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

Taxes of 1903.

A writ of *certiorari* having been issued out of this Court on the 30th day of October, 1903, upon the petition of the relators herein,

verified the 30th day of October, 1903, and thereafter a return to said writ having been made by the respondents herein, said return being verified the 18th day of December, 1903, this proceeding coming on to be heard in its order on the preferred calendar on the 16th day of May, 1904, the relators moving the Court to reduce the assessment complained of in the petition from the sum of $94,600
21 to the sum of $797.68, for the reasons mentioned in the petition, and the respondents moving the Court to confirm the assessment and to dismiss the proceeding, now, upon the said petition, writ and return, and after hearing William A. Jenner, Esq., of counsel for the relators, and Curtis A. Peters, Esq., of counsel for the respondents, and after due deliberation it appearing to the Court that the assessment complained of was not illegal or erroneous for any of the reasons alleged in the petition, on motion of John J. Delany, Esq., Corporation Counsel, attorney for respondents, it is

Ordered that the motion of the relators be and it hereby is in all respects denied, that the said writ of *certiorari* be dismissed and that the assessment be and hereby is in all respects confirmed, with costs to the respondents to be taxed in accordance with the provisions of Section 254 of Chapter 908 of the Laws of 1896.

Enter.

DAVID LEVENTRITT, *J. S. C.*

22 *Opinion.*

Supreme Court, Special Term, Part III.

PEOPLE *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Plaintiff,
against
JAMES T. WELLS ET AL., Defendants.

LEVENTRITT, *J.:*

The principle and reasoning of People *ex rel.* Yellow Pine Co. *vs.* Barker (23 App. Div. 524, aff'd, 155 N. Y., 665), are authority for the proposition that the credits or bills receivable of the Relator are taxable as capital invested in business in this State within the meaning of Section 7 of the Tax Law. I fail to see how these credits become less taxable because they are the proceeds of sales made of imported goods in original packages. This is not a tax on imports and thus does not contravene Article 1, Section 10 of the Federal Constitution; it is not a tax on the sales as such, or on the right to sell goods in the importer's hands while in their original packages. But when these packages have been sold and the proceeds have become part of the assets of a person doing business in this State, as in the case of this Relator (People *ex rel.* Philip Carey Co. *vs.* Feitner, 39 Misc., 282; People *ex rel.* Durand-Ruel *vs.* Wells, 41 Misc., 144, aff'd App. Div., M. S., March 25, 1904; People *ex rel.* Armstrong Cork Co. *vs.* Barker, 157 N. Y., 159). I think the property
23 must be regarded as having lost its distinctive character as an import, and mixed with the mass of relator's property (See Brown *vs.* Maryland, 9 Wheaton, 419).

The writ should be dismissed.

Notice of Appeal.

Supreme Court, County of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Relator,
against
JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

Notice of Appeal.

SIR: Please take notice that the above named relator, Edward & John Burke, Limited, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Department, from the order of this Court in the above-entitled proceeding entered in the office of the Clerk of the County of New York,
24 on the 29th day of June, 1904, dismissing the writ of *certiorari* herein and confirming the assessment complained of in the petition herein, with costs, and from each and every part of said order.

Dated New York, July 7th, 1904.

Yours, etc.,
WETMORE & JENNER,
Attorneys for Relator, 34 Pine Street, Borough of Manhattan, New York City.

To John J. Delany, Esq., Corporation Counsel of the City of New York, Thomas L. Hamilton, Esq., Clerk of the County of New York.

It is hereby stipulated under and pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing printed papers are true and correct copies of the original petition, order allowing writ, writ of *certiorari*, return, order dismissing writ, opinion, and notice of appeal, and of the whole thereof, the same including all the papers and proofs used before the Court below, and upon which its order was based and now on file in the office of the Clerk of the County of New York, and we hereby waive certification thereof by the clerk.

WETMORE & JENNER,
Attorneys for Appellant.
JOHN J. DELANY,
Attorney for Repondents.

25 *Order of Appellate Division Appealed From.*

At a Term of the Appellate Division of the Supreme Court held in and for the First Department, at the Court House of the Appellate Division, in the County of New York, on the seventh day of July, 1905.

Present—
Hon. Morgan J. O'Brien, J. P.
Hon. Edward Patterson,
Hon. George L. Ingraham,
Hon. Chester B. McLaughlin,
Hon. Edward W. Hatch, JJ.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EDWARD and JOHN BURKE, LIMITED, Relator-Appellant,
against
JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants-Respondents.

The above-named relator, Edward and John Burke, Limited, having appealed to the Appellate Division of the New York Supreme Court for the First Department from the order in the above-entitled proceeding entered and filed in the office of the Clerk of the County of New York on the 29th day of June, 1904, dismissing the writ of *certiorari* herein and confirming the assessment complained of in the petition herein, with costs, and the said ap-
26 peal having come duly on to be heard, now, after hearing Mr. Edmund Wetmore, of counsel for relator, in support of said appeal, and Mr. Curtis A. Peters, Assistant Corporation Counsel, of counsel for respondents, in opposition thereto, and due deliberation having been had, on motion of John J. Delany, Corporation Counsel, it is

Ordered that the said order so appealed from, as aforesaid, be and the same hereby is affirmed, with costs and disbursements to respondents.

Affidavit of No Opinion.

Supreme Court, New York County.

PEOPLE *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Relator-Appellant,
against
JAMES L. WELLS ET AL., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

STATE OF NEW YORK, *County of New York, ss:*

Oscar W. Jeffery, being duly sworn, says: I am an attorney at law associated with the office of Wetmore & Jenner, attorneys for

the relator-appellant herein, and have had charge of all the
27 proceedings heretofore taken herein on behalf of said relator.
No opinion was rendered herein by the Appellate Division of the Supreme Court on the appeal to that Court. Said Court affirmed the order appealed from on the opinion of the Court below. Two of the Justices of said Court, Mr. Justice Ingraham and Mr. Justice McLaughlin, dissented, but rendered no opinion.

OSCAR W. JEFFERY.

Sworn to before me this 6th day of September, 1905.

GRACE A. TAYLOR,
Notary Public, New York Co.

Notice of Appeal.

Supreme Court, New York County.

PEOPLE *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Relator-Appellant,
against
JAMES L. WELLS ET AL., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

Please take notice that the relator hereby appeals to the Court of Appeals from the order of the Appellate Division of this Court, First Department, entered herein in the office of the Clerk of the County of New York on or about the 22d day of July, 1905, and from each
and every part of said order; said order affirming an order of
28 this Court entered herein in the office of the Clerk of the County of New York on or about the 29th day of June, 1904, dismissing the writ of *certiorari* herein and affirming the assessment complained of in the petition herein with costs.

Dated August 29th, 1905.

WETMORE & JENNER,
Attorneys for Relator-Appellant,
34 *Pine Street, Borough of Manhattan, New York City.*

To the Clerk of the County of New York. John J. Delany, Esq., Attorney for Respondents.

Stipulation Waiving Certification.

It is hereby stipulated and agreed that the foregoing are true and complete copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division appealed from, and all the papers upon which the Appellate Division of the Supreme Court, First Department, acted in making the order appealed from, now on file

in the office of the Clerk of the County of New York, and certification thereof by said Clerk is hereby waived.

Dated New York, September 14th, 1905.

WETMORE & JENNER,
Attorneys for Relator-Appellant.
JOHN J. DELANY,
Corporation Counsel, Attorney for Respondents.

29 At a Special Term, Part II, of the Supreme Court, held in and for the County of New York, at the county Court House in said County on the 16th day of March, 1906.

Present: Hon. James Fitzgerald, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EDWARD and JOHN BURKE, LIMITED, Relator-Appellant,
against
JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants-Respondents.

The above-named relator having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of this Court, First Department, entered herein in the office of the Clerk of said Appellate Division on or about the 22nd day of July, 1905, affirming the order of this Court, entered herein in the office of the Clerk of the County of New York on or about the 29th day of June, 1904, dismissing the writ of certiorari herein and affirming the assessment complained of in the petition herein, with costs, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having
30 ordered and adjudged that the said order so appealed from as aforesaid be affirmed, with costs, and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court, there to be proceeded upon according to law; now, upon reading and filing the said remittitur, and on motion of John J. Delany, Corporation Counsel, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter,

J. F., *J. S. C.*

30½ [Endorsed:] New York Supreme Court. The Peo. *ex rel.* Edward and John Burke, Limited, Relator-Appellant, against James L. Wells *et al.* as Comm'rs of Taxes and Assessments of The City of New York, Defendants-Respondents. Order and notice of entry. Filed Mar. 16, 1906.

31 Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EDWARD and JOHN BURKE, LIMITED, Relator-Appellant,

against

JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants-Respondents.

The above-named Relator having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of this Court, First Department, entered herein in the office of the Clerk of said Appellate Division on or about the 22nd day of July, 1905, affirming the order of this Court entered herein in the office of the Clerk of the County of New York on or about the 29th day of June, 1904, dismissing the writ of certiorari herein and affirming the assessment complained of in the petition herein with costs and the said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and an order having been duly entered in the office of the Clerk of the County of New York, on the 16th day of March, 1906, making the order and judgment of the Court of Appeals the order and judgment of this Court, and the costs of the defendants
32 having been duly taxed at the sum of $112.70, now on motion of John J. Delany, Corporation Counsel, it is

Adjudged that the said order so appealed from as aforesaid be and the same hereby is affirmed, and it is further

Adjudged that the above-named defendants, James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, recover of the above-named relator, Edward and John Burke, Limited, the sum of $112.70, the amount of their costs as taxed and that they have execution therefor.

Dated, New York, April 23 1906.

PETER J. DOOLING, *Clerk.*

M. J. D.

33 [Endorsed:] New York Supreme Court. County of New York. The Peo. of the State of New York on the Relation of Edward and John Burke, Limited, Relator-Appellant, against James L. Wells, *et al.*, as Commissioners of Taxes and Assessments of The City of New York, Defendants-Respondents. Enrollment. Filed April 23 1906. 2 o'clock and 30 m.

34 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Plaintiff in Error,

vs.

JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER, and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants in Error.

Petition for Writ of Error.

Now comes Edward & John Burke, Limited, the above named relator, by Edmund Wetmore, its counsel, and says, that on the 14th day of March, A. D. 1906, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of the Commissioners of Taxes and Assessments of the City of New York, defendants in error above named, and against the People of the State of New York *ex rel.* Edward & John Burke, Limited, plaintiff in error above named, and afterwards, and on the 23rd day of April, A. D. 1906, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for the County of New York, said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of said Supreme Court, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of errors which is filed with this petition.

35 The said Court of Appeals of the State of New York is the highest court of the said State of New York in which a decision in this cause could be had.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, that said writ of error operate as a supersedeas, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, that upon the giving of such security, all further proceedings in said Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, the 11th day of May, 1906.

EDMUND WETMORE,
Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, and the bond is fixed at the sum of $2000.

Dated, the 14 day of May, 1906.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

36 [Endorsed:] United States Supreme Court. People of the State of New York, *ex rel.* Edward & John Burke, Limited, Plaintiff-in-Error *vs.* James L. Wells, *et al.*, as Commissioners of Taxes and Assessments of the City of New York, Defendants-in-Error. (Original) Petition for Writ of Error. Edmund Wetmore, Counsel for Plaintiff-in-Error, 34 Pine St., New York. Received May 21, 1906.

37 Copy.

Know all men by these presents, That we, Edward & John Burke, Limited, a corporation as principal, and the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana, and lawfully transacting business in the State of New York, and having an office and usual place of business in said State at #35 Nassau Street in the Borough of Manhattan, City and County of New York as surety, are held and firmly bound unto James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments of the City of New York in the full and just sum of Two thousand ($2000.) Dollars, to be paid to the said James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments of the City of New York, their certain attorney, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May, 1906.

Whereas, lately in the Supreme Court of the State of New York, in a suit pending in said Court between said People of the State of New York *ex rel.* Edward & John Burke, Limited, plaintiff-respondent and said James L. Wells, Williams S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments of the City of New York, defendants-appellants, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York against said People of the State of New York *ex rel.* Edward & John Burke, Limited, plaintiff-respondent, in favor of said James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus

38 L. Scott, as Commissioners of Taxes and Assessments of the City of New York, defendants-appellants, and said plaintiff-respondent having obtained from a justice of the Supreme Court of the United States a writ of error, and filed a copy thereof in the clerk's office of the Supreme Court of the State of New York, to reverse said judgment in the aforesaid suit, and a citation directed to said James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioner of Taxes and Assignments of the City of New York, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days from date thereof.

Now, the condition of the above obligation is such, that if the said Edward & John Burke, Limited, a corporation as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

EDWARD & JOHN BURKE,
LIMITED,
By COURSEN H. KING,
Agent & Attorney in Fact.
FEDERAL UNION SURETY
COMPANY,
By ROBERT M. NUGENT,
Res. Vice-President.

[L. S.]

Attest:
F. STEARNS EDICK,
Res. Asst. Secretary.

39 STATE OF NEW YORK,
City and County of New York, ss:

On this 11th day of May, 1906, before me personally came Coursen H. King, to me known, who being duly sworn by me did depose and say that he resides at Scarborough, New York; that he is agent and attorney in fact for Edward & John Burke, Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, having its main office and place of business at Dublin, Ireland, the corporation described in and which executed the above instrument; that the same was signed by him under due power and authority from the Board of Directors of said corporation, but that the seal of said corporation is not attached, there being no seal of said corporation in the United States.

[SEAL.]

OSCAR W. JEFFERY,
Notary Public, New York County.

40 *Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 10th day of May, one thousand nine hundred and six, before me personally came Robert M. Nugent, known to me to be the Resident Vice-President, of the Federal Union Surety Company, the corporation described in and which executed the annexed bond of Edward & John Burke, Limited as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that said Federal Union Surety Company is duly and legally incorporated under the laws of the State of Indiana; that said Company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that

the seal affixed to the annexed bond (Form —) of Edward & John Burke, Limited is the corporate seal of said Company, and was thereto affixed by order and authority of the board of directors of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with F. Stearns Edick and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said F. Stearns Edick subscribed to said bond is in the genuine handwriting of said F. Stearns Edick and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of Three hundred thousand dollars.

ROBERT M. NUGENT.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 10th day of May, 1906.

[L. S.] CATHRYN F. ASPELL,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

41 [Endorsed:] Copy. Supreme Court of the United States. People of the State of New York, *el rel.* Edward & John Burke, Limited, Plaintiff in Error, *vs.* James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments of the City of New York, Defendant in Error. Undertaking Surety: Federal Union Surety Company. Approved May 14, 1906. R. W. Peckham, Asso. Just. Sup. Ct., U. S.

42 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK, *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Plaintiff in Error,
vs.
JAMES L. WELLS, WILLIAM S. COGSWELL, GEORGE J. GILLESPIE, SAMUEL STRASBOURGER and RUFUS L. SCOTT, as Commissioners of Taxes and Assessments of the City of New York, Defendants in Error.

Assignment of Errors.

Now comes Edward & John Burke, Limited, the above named relator, by Edmund Wetmore, its counsel, and, in connection with the petition for the writ of error filed herewith says that in the record and proceedings in this cause and in the final order and judgment made and entered herein on the 23rd day of April A. D. 1906, by

the Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

Error in holding that the act of the Commissioners of Taxes and Assessments of the City of New York in assessing the proceeds of the said relator's sales of goods in original packages as shown by said record and proceedings was not in effect levying a tax upon imports in contravention of Article 1, Section 10 of the Constitution of the United States.

II.

Error in holding that said assessment did not levy a tax upon imports in contravention of Article 1, Section 10 of the Constitution of the United States but taxed capital invested in the State of New York under the terms of the statutes of said State.

43

III.

Error in declining to hold that the proceeds of the sales of imported goods in original packages by said relator, as shown by said record and proceedings, were merely collected here and transmitted abroad after deducting duties and expenses, and were, therefore, not liable to taxation by the City of New York.

IV.

Error in holding that the proceeds of said sales by relator consisting of cash and bills receivable simply collected here and transmitted abroad constituted capital invested in business in the State of New York under the statute of said State by which said assessment is alleged to be made.

V.

Error in declining to hold that even if the proceeds of said sales could be regarded as capital invested in business they would still be exempt from taxation because they are used only in the importation and sale of goods in unbroken original packages.

EDWARD & JOHN BURKE, LIMITED,
By EDMUND WETMORE, *Counsel.*

44 [Endorsed:] Supreme Court of the United States. People of the State of New York, *ex Rel.* Edward & John Burke, Ltd., Plaintiff-in-Error, *vs.* James L. Wells *et al.*, as Commissioners of Taxes and Assessments of the City of New York, Defendants-in-Error. Orig. Assignment of Errors. Edmund Wetmore Counsel for Plaintiff-in-Error, 34 Pine St., New York. Received May 21 1906.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable, the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said State in which a decision could be had, before you, or some of you, between the People of the State of New York *ex Rel.* Edward & John Burke, Limited, relator-appellant, and James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments constituting the Board of Taxes and Assessments of the City of New York, defendants-respondents, wherein was drawn in question the construction of a clause or clauses of the Constitution of the United States and the decision was against the right, title, privilege or exemption specially set up or claimed under said clause or clauses of the said Constitution, a manifest error hath happened to the great damage of the said People of the State of New York *ex Rel.* Edward & John Burke, Limited, as by its petition appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washing-
46 ton, in the District of Columbia within thirty (30) days from the date hereof, in the said Supreme Court, that, the record, and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

May 15, 1906.

47 [Endorsed:] United States Supreme Court. People of the State of New York, *ex Rel.* Edward & John Burke, Limited, Plaintiff-in-Error, *vs.* James L. Wells, *et al.*, as Commissioners of Taxes and Assessments of the City of New York, Defendants-in-

Error. (Original.) Writ of Error. Edmund Wetmore, Counsel for Plaintiff-in-Error, 34 Pine St., New York. Received May 21 1906.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger and Rufus L. Scott, as Commissioners of Taxes and Assessments of The City of New York, and John J. Delany, Corporation Counsel of The City of New York, their attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden in the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of New York, for the County of New York, in an action wherein the People of the State of New York *ex rel.* Edward & John Burke, Limited, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, on the 15th day of May, in the year of our Lord one thousand nine hundred and six.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Copy of the above citation received by me at the office of the Corporation Counsel of the City of New York, this 17th day of May, A. D. 1906.

JOHN J. DELANY,
Att'y for Defendant.

49 [Endorsed:] United States Supreme Court. People of the State of New York, *ex rel.* Edward & John Burke, Limited, Plaintiff-in-Error, *vs.* James L. Wells, *et al.*, as Commissioners of Taxes and Assessments of the City of New York, Defendants-in-Error. (Original.) Citation. Edmund Wetmore Counsel for Plaintiff-in-Error, 34 Pine St., New York. Received May 21, 1906.

50 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* EDWARD & JOHN BURKE, LIMITED, Appellant,

v.

JAMES L. WELLS ET AL., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

CULLEN, *Ch. J.:*

The relator is a foreign corporation engaged at Dublin, Ireland, in the manufacture of spirituous and malt liquors. It has established

and maintains an office in the city of New York for the sale of its products, which are imported into this country and sold in the original packages. The relator made application under the statute
51 for permission to carry on business in this state, and was granted such permission. In January, 1903, it was assessed for personal property in this state at the sum of $94,617.93 for three separate items—the value of its office furniture, $797.68; cash on hand and in bank, $6,122.63, and the remainder for bills receivable held in the city of New York.

The relator contends that so far as the last two items are concerned they do not represent capital employed in this state within the meaning of our Tax Law, and further that as they are the proceeds of sales in original packages they are not subject to taxation by the state. The first contention we will not discuss, as we deem the question settled by the recent decision of this court in People *ex rel.* Farcy & Oppenheim Co. *v.* Wells (183 N. Y. 264). As the point presented by the relator's second claim was not involved or at least not raised in the case cited, we will briefly consider it.

It is well settled that while imported goods are in the hands of the importer in the original packages they are not subject to taxation by the state, nor can any tax be imposed upon their sale by way of a license tax or percentage on the price for which they may be sold. But though no tax can be imposed either on the goods themselves or their sale, we find no authority for the proposition that the proceeds of the sales have a similar immunity from taxation. Doubtless, if the tax were imposed on the proceeds as such, and because they were derived from the sales of imported goods, it would be invalid, but if those proceeds have become part of the common mass of the property within a state, they are subject to taxation of course, without discrimination, the same as other property. In Hibernia Savings & Loan Association *v.* City and County of San Francisco (decided Jan. 29th, 1906), the Supreme Court of the United States held that two checks on the United States treasury received by the appellant as interest upon certain registered government bonds held by it were taxable, though the bonds themselves were exempt from taxation. Justice Brewer there said: "Had the plaintiff drawn the money immediately upon these checques
52 it would have become at once a part of the general property of the bank, and the fact that the money had been derived from the United States and paid to the bank as interest on its obligations would not have prevented its becoming part of the general property of the bank, and subject to state taxation."

The real question in this case, therefore, is whether the property on which the relator has been taxed, though belonging to a non-resident, had acquired such a situs within this state as to be subject to taxation—a question that does not depend on the source from which the property was derived. We assume that if a non-resident sold within this state property which under the Federal Constitution was immune from taxation, such as imported goods in the original packages or government bonds, and forthwith transmitted the proceeds of the sale without the state, the proceeds would not be subject to

local taxation simply because in the course of transmission they happened to be physically within the state on assessment or listing day; at least the legislature has never attempted to subject such money or property to taxation. The question seems to us to be substantially the same as that which has been several times presented as to the right of the state to tax property in course of transportation through its limits to other states, for we see no difference in principle in this respect between foreign and interstate commerce. "The law on this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." (Kelley *v.* Rhoads, 188 U. S. 1; see Diamond Match Co. *v.* Ontonagon, *Id.* 82; Brown *v.* Houston, 114 *id.* 622; Pittsburg, etc., Coal Co. *v.* Bates, 156 *id.* 577.)

The evidence appearing in this record as to the exact manner in which the relator carried on its business in the city of
53 New York is meager, but the presumption is that the determination of the assessors was correct, and to relieve itself from the assessment it was incumbent upon the relator to clearly show that the assessment was erroneous (People *ex rel.* Westchester F. Ins. Co. *v.* Davenport, 91 N. Y. 574.) It is true that at one point in its return to the assessors, the relator's agent states that the proceeds of the sales of the goods are at once remitted to the main office in Dublin after reserving the necessary amount for paying the expenses of the business conducted in the city of New York. But this is qualified by the subsequent statement that the amounts of the bills receivable and bank accounts are invested in the city of New York. It was not denied that the notes were physically in the state of New York, and it was admitted upon the argument that both the notes and open accounts were held in New York until maturity, there collected and after collection the proceeds remitted to Dublin. It is plain that the moneys deposited in bank, so far as they are retained for the payment of duties and expenses of the New York office are in no sense in the course of transmission abroad. The duties referred to in the statement must be duties to be paid on other goods which the relator might subsequently import or sell, not the goods which had been sold, for as we understand it, duties must be paid in advance of taking the goods out of the custom house. We cannot see that the condition of this bank deposit in any way differs from other bank deposits of non-residents, and it seems to be settled by authority that the bank deposits in this state of a non-resident are subject to taxation by the state. (New Orleans *v.* Stempel, 175 U. S. 309; Blackstone *v.* Miller, 188 *id.* 189.)

It is also settled that the situs for the purpose of taxation of promissory notes and similar instruments for the payment of money where the "debt is inseparable from the paper which declares and constitutes it," is the place where it is actually and physically held. (State

Tax on Foreign Held Bonds, 15 Wall. 300; New Orleans *v.*
54 Stempel and Blackstone *v.* Miller, *supra;* People *ex rel.* Westbrook *v.* Board of Trustees Vil. of Ogdensburgh, 48 N. Y. 390.)

Therefore, unless these notes were in course of transmission to the home office of the relator in Dublin, they were properly assessed. But they were not *in transitu;* they were held here until maturity for the convenience of the relator and the proceeds in part then remitted. The case does not seem to differ in principle from one where a non-resident, equally for his convenience, deposits his securities with an agent within the state for custody and collection, and in such case it has been held that such notes and securities are subject to taxation in the state where they are on deposit. (New Orleans *v.* Stempel, *supra.*) It is also to be observed that in the case before us the retention of the notes in this state was not casual or exceptional, but in accordance with the relator's regular and permanent course of business.

We think it is not necessary to consider whether the open accounts present a different question from that involved in the notes. As already stated, it was incumbent upon the relator to distinctly point out any error committed by the assessors, and if part of the bills receivable were not subject to taxation, it should have shown what the amount of that part was.

The order appealed from should be affirmed, with costs.

A copy.

E. A. BEDELL,
State Reporter.

C.

55 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that the foregoing copy of the opinion written by Chief Justice Cullen of the Court of Appeals in the case of The People of the State of New York *ex rel.* Edward and John Burke, Limited, Appellant against James L. Wells, *et al.,* as Commissioners of Taxes and Assessments of the City of New York, Respondents, has been duly compared by E. A. Bedell, the State Reporter, and that he has certified that the same is a true and correct copy of the original thereof now in the possession of said State Reporter.

In witness whereof I have hereunto set my hand and affixed my official seal at the City of Albany, this nineteenth day of May A. D., 1906.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND, *Clerk.*

56 STATE OF NEW YORK, *County of New York:*

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served upon me on the Twenty first day of May 1906 and in obedience thereto, do hereby certify that the foregoing Pages Numbered from 1 to 32 inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit The People of the State of New York *ex rel.* Edward and John Burke Limited, *vs.* James L. Wells *et al.* Commissioners of Taxes and Assessments etc. mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error the citation to the writ in error with proof of service of the same, the said writ of error served upon me and opinion of the Court of Appeals.

In testimony whereof I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the —.

[Seal New York.]

PETER J. DOOLING, *Clerk.*

Endorsed on cover: File No. 20,266. New York supreme court. Term No. 302. The People of the State of New York *ex Rel.* Edward and John Burke, Limited, plaintiff in error, *vs.* James L. Wells, William S. Cogswell, George J. Gillespie, Samuel Strasbourger, and Rufus L. Scott, as commissioners of taxes and assessments of the city of New York. Filed May 24th, 1906. File No. 20,266.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD & JOHN BURKE, LIMITED, Plaintiff in Error, vs. JAMES L. WELLS ET AL., Commissioners of Taxes and Assessments, etc., Defendants in Error.	In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case comes up on writ of error to the Supreme Court of the State of New York to review a judgment of that Court entered upon a remittitur from the Court of Appeals of said State affirming an assessment of taxes against the plaintiff in error imposed by the defendants in error, who constituted the Board of Taxes and Assessments of the City of New York in the year 1903.

Facts.

There is no conflict of evidence as to the facts in the case. They are narrated in the statement for purposes of revision attached to the petition of the relator to

the New York Supreme Court for a writ of *certiorari* to review the action of said Board of Taxes and Assessments, and in the return to said writ. They are as follows:

The relator and plaintiff in error, Edward & John Burke, Limited, is a corporation organized under the laws of Great Britain and Ireland, having its principal place of business in Dublin, Ireland. It is engaged in the business of manufacturing, bottling and selling various liquors and beverages, such as stout, whiskey, etc. It keeps an office and wareroom in the Borough of Manhattan, City of New York, to which it sends its products from Ireland in unbroken original packages to be sold. On all these goods it pays duties to the United States. The proceeds of the sales of the goods are at once remitted to the main office in Dublin, after reserving the necessary amount to pay duties and expenses of the business conducted in the City of New York. No other business is transacted by the corporation in the State of New York than the sale of its products and the collection and remittance of the proceeds from the same, as above stated.

The corporation has procured a certificate authorizing it to do business in said State.

The assessment complained of was made as follows:

On the second Monday of January, 1903, the relator's assets in the State of New York consisted of:

Amount receivable on notes and open accounts	$111,751.53
Cash on hand and in banks	6,122.63
Value of goods on hand	45,841.21
Safes, fixtures and furniture	797.68
	$164,513.05

The great part of the cash on hand and in bank was in process of transmission to the main office.

The bank account is, to a very large extent, kept to cover the payment of duties on the goods shipped here for sale.

The entire amount of bills receivable, open accounts and cash on hand resulted directly from the sale of imported goods in unbroken original packages.

In making the assessment on the foregoing state of facts, the commissioners deducted from the relator's total assets,

Amount of bills payable	$24,053.91
Cash price of imported goods on hand in original packages	45,841.51
	$69,895.42

After making these deductions there remained from said assets $94,617.93, at which amount the assessment was fixed. That is, the commissioners recognized that the relator's goods in original packages upon which duties had been paid to the United States were not subject to State taxation, but held that the *proceeds* of the *sale* of such goods *in original packages*, collected and deposited here merely for the purpose of remittance to the relators abroad, after paying expenses *were* subject to State taxation (Rec., pp. 5, 6).

The statute under which the plaintiff-in-error was taxed and the assessment made, is as follows :

> " Non-residents of the state doing business in
> " the state, either as principals or partners, shall
> " be taxed on the capital invested in such busi-
> " ness, as personal property, at the place where
> " such business is carried on, to the same extent
> " as if they were residents of the state."
>
> *N. Y. Session Laws, 1896, Chap. 908, Sec. 7.*

This assessment was brought up for review by *certiorari* and was confirmed by the New York Supreme Court at Special Term, and its ruling affirmed by the Appellate Division of the Court, two of the Justices dissenting, and by the Court of Appeals of the State, one of the Justices dissenting (184 N. Y., 275, 280).

The relator and plaintiff in error disputed the cor-

rectness of the assessment on the ground that it was contrary to law and the provisions of the Constitution of the United States, in that it was a tax on imports, in violation of Article 1, section 10, of the Constitution, and an interference with the power to regulate foreign commerce (Rec., p. 4, fol. 3 ; p. 15, fol. 22 ; p. 18, fol. 27 ; p. 28, *et seq.*).

The Court of Appeals held that said proceeds constituted capital invested in business in the State of New York and taxable by the State, and that the tax imposed was not in violation of the Constitution of the United States. This clearly raises a federal question appealable to this Court.

Chicago, B. & Q. Railroad vs. Chicago, 166 U. S., 226, 231.
Merchants Nat. Bank vs. Wehrmann, 202 U. S., 295, 299.
Furman vs. Nichol, 8 Wall., 44, 56.

Errors Assigned.

The errors assigned are set forth at page 25 of the record and are in substance that said Court of Appeals erred in holding that the proceeds of said sales in original packages collected here and transmitted abroad, after deducting duties and expenses, as set forth in the foregoing statement of facts, constituted capital invested in business in the State of New York, taxable by the State, and in not holding that the tax laid in this case upon said proceeds was a tax upon imports in contravention of Article 1, section 10, of the Constitution of the United States.

The ground taken by the plaintiff in error is that the tax on the proceeds of the goods in original packages in the course of transmission to the owner abroad, is in essence and effect a tax upon the sale of said goods, and, therefore, a tax upon imports and a violation of the Constitution under the principle laid down in *Brown vs. State of Maryland* (12 Wheaton, 419) and the cases following that decision.

POINTS.

FIRST.

A State tax upon the proceeds received for the sale of an article in original and unbroken packages, imported only for sale, and upon which duties have been paid, and where the only disposition made of said proceeds is to collect them and at once remit them to the importer abroad, after deducting the amount of duties paid and the expenses necessarily incident to said importation and sale, is a tax upon imports and a violation of the Constitution of the United States.

1. In *Brown vs. State of Maryland* (12 Wheat., 436), which constitutes a landmark in the development of our Constitutional law, the question arose upon a law of the State of Maryland requiring a license from an importer before he should be permitted to sell a package of imported goods.

It was held, in the language of Chief Justice MARSHALL that "a tax on the sale of an article imported only for sale, is a tax on the article itself," and therefore a tax upon imports, and that a tax upon imports is also, necessarily, an invasion of the power of Congress to regulate foreign commerce, because "the right to sell is connected with the payment of duties" as an "inseparable incident" of the law permitting importation (12 Wheat., 442, 444, 448).

Fairbank vs. United States, 181 U. S., 283, 295.

The rule has been stated as follows by the New York Court of Appeals, referring to imports in original and unbroken packages: "A tax upon their sale, if it were

" possible to regard it otherwise than as a tax upon " the article itself, would be in derogation of the right " to sell, which is an inseparable incident of the law " permitting importation, and which the importer " acquired by the payment of duties to the United " States."

The People vs. Maring, 3 Keyes, 374, 376.

2. The rule that a tax upon the sale of imported goods, as above set forth, is not affected by the *form* of the tax, whether it is *eo nomine* upon the right to sell, or upon the proceeds, or upon the business of importing, or in any other form, provided it is the same in *effect* as if it was upon the right to sell, and must be paid by the importer in like manner as a direct duty on the article itself would be paid.

In *Cook vs. Pennsylvania* (97 U. S., 566), the State of Pennsylvania laid a tax, consisting of a percentage upon sales made by an auctioneer of foreign goods placed in his hands by the importer and sold by him at auction in the original packages. It was held that " the tax on sales made by an auctioneer is a tax on the goods sold " and " when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports " (97 U. S., 573).

This rule applies whenever the State tax is an impediment to the exercise of a power of the United States, whether it be the power to lay duties, to regulate commerce, to borrow money or any other of the constitutional powers vested in Congress. Says Chief Justice MARSHALL, in *M'Culloch vs. The State of Maryland* (4 Wheaton, 316) " the States have no power by taxation or otherwise to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government " (4 Wheat., p. 436).

The instances of the application of this principle are

most numerous; in *Crandall vs. State of Nevada* (6 Wall., 35), where "the State had passed a law requir- "ing those in charge of all the stage-coaches and rail- "roads doing business in the State to make report of "every passenger who passed through the State or "went out of it by their conveyances, and to pay a tax "of one dollar for every such passenger. The argu- "ment was urged there, that the tax was laid on the "business of the railroad and stage-coach companies, "and the sum of one dollar exacted for each passenger "was only a mode of measuring the business to be "taxed. But the court said, as in Passenger Cases, "that it was a tax which must fall on the passenger, "and be paid by him for the privilege of riding "through the State by the usual vehicles of travel" (97 U. S., 571).

Or in *Case of the State Freight Tax* (15 Wall., 232), where Mr. Justice STRONG says: "The case presents "the question whether the statute in question—so far "as it imposes a tax upon freight taken up within the "State and carried out of it, or taken up outside the "State and delivered within it, or, in different words, "upon all freight other than that taken up and deliv- "ered within the State—is not repugnant to the pro- "vision of the Constitution of the United States." In commenting upon which Mr. Justice MILLER says: "It "was argued here again that the tax was one on the "business and franchises of the railroad companies "which were required to pay it; but the court, re- "viewing the authorities, said that the inquiry was "upon what did the burden really rest, and not upon "the question from whom the State exacted payment "into its treasury. This language was abundantly sup- "ported by the cases concerning tax on the national "banks; namely, *Bank of Commerce v. New York* "*City*, 2 Black, 620; *Bank Tax Cases*, 2 Wall., 200; "*Society for Savings v. Coite*, 6 *id.*, 594; *Provident* "*Institution v. Massachusetts*, *id.*, 611."

In *Western Union Tel. Co. vs. Alabama*, 132 U. S., 472, it was held that no tax could be collected by the

State on gross receipts from telegraphic messages carried partly within and partly without the State, as being in violation of the constitutional right of Congress to regulate commerce.

In *Fargo vs. Michigan*, 122 U. S., 230, the State tax upon the gross receipts of railroads into or out of the state was held void. The States cannot be permitted under the guise of a tax upon the business transacted within their borders to impose a burden on commerce among the States when the business so taxed is itself interstate commerce.

The same rule was applied in *Postal Telegraph Cable Co. vs. Adams*, 155 U. S., 688, and in *Philadelphia Steamship Co. vs. Pennsylvania*, 122 U. S., 326, overruling the case of State tax on Railway gross receipts (15 Wall., 284).

SECOND.

The tax complained of was, in effect, levied on the goods of the plaintiff in error, and paid by the plaintiff in error for the right to sell them, and the proceeds from which the tax was deducted had not become part of the common mass of property within the State of New York nor were they invested therein.

The rule enunciated in the foregoing authorities cited under the First Point is established and familiar and is not, of course, disputed on behalf of the defendants in error. It is admitted in the opinion of the Court of Appeals that "it is well settled that while

" imported goods are in the hands of the importer in " the original packages they are not subject to taxation " by the State, nor can any tax be imposed upon their " sale by way of a license tax or percentage on the " price for which they may be sold " (Rec., p. 38, fol. 51), and said opinion contains the further statement:

" We assume that if a non-resident sold within this " state property which under the Federal Constitution " was immune from taxation, such as imported goods " in the original pages or government bonds, and *forth-* " *with* transmitted the proceeds of the sale without " the state, the proceeds would not be subject to local " taxation simply because in the course of transmission " they happened to be physically within the state on " assessment or listing day; at least the legislature has " never attempted to subject such money or property " to taxation. The question seems to us to be sub- " stantially the same as that which has been several " times presented as to the right of the state to tax " property in course of transportation through its " limits to other states, for we see no difference in " principle in this respect between foreign and inter- " state commerce. ' The law on this subject, so far as " ' it concerns interference with interstate commerce, is " ' settled by several cases in this court, which hold " ' that property *actually in transit* is exempt from local " ' taxation, although if it be stored for an indefinite " ' time during such transit, at least for other than " ' natural causes, or lack of facilities for immediate " ' transportation, it may be lawfully assessed by the " ' local authorities ' (Kelley v. Rhoads, 188 U. S., 1; " see Diamond Match Co. v. Ontonagon, *Id.* 82; " Brown v. Houston, 114 *id.* 622; Pittsburg, etc., Coal " Co. v. Bates, 156 *id.* 577.)" (Italics supplied.)

The grounds of the decision below, briefly stated, were:

1. That the tax on the proceeds represented by cash in bank and bills receivable was not imposed on the proceeds *as such;*

2. That the said proceeds had become part of the common mass of property within the state; and were *invested* in the City of New York, and that the *situs* of the said proceeds for the purpose

of taxation so far as represented by promissory notes was the City of New York, where they were physically held till collection.

(a) To present the question raised in a concrete form, let it be assumed, as a hypothetical case, that the goods on arrival are sold for cash and the cash at once transmitted to Dublin. It is admitted by the learned Court below, as already stated, that, in such case, the cash received would not be taxable by the State. Would it become taxable if the remittance were made in ordinary course by bill of exchange, and the amount of duties paid, and the expenses of the sale—such as transportation and delivery to the buyer and the like—deducted from the amount remitted? We believe the admission of the learned Court below would cover the case supposed and that the mode of transmission of the proceeds and the deduction of incidental expenses would not affect their exemption from State taxation. Now, it may be further asked whether the case would be altered if the supposed sale was on credit and constituted an open book account against the buyer?

This question was not considered by the Court below, the opinion stating that the Court did not deem it necessary to pass upon it. It is submitted that the circumstance of a mere deferring of the payment for the goods does not alter the character of the tax, and if it be unconstitutional if levied upon an immediate payment, it is unconstitutional if levied upon a deferred payment.

This brings the supposed case to the final stage, namely, would it be altered if the deferred payment were represented by a promissory note or similar instrument?

In considering this question, it may be repeated that the fact must be kept in view that the goods themselves, so long as they remain the original packages, are not taxable by the State, and that the owner has paid to the United States for the privilege of

selling them in their original packages, so that a state tax, which is *in effect* a tax upon the goods themselves, or, which is the same thing, upon their *sale* in original packages, is a tax upon imports and within the Constitutional prohibition, whatever the *form* in which it may be laid. Whether it take the form of a *license fee* for the right to sell, or the deduction of a *percentage* on the amount of the sale, or a deduction from the gross proceeds, or, as is submitted, from the *net* proceeds, and whether it is laid *eo nomine* on the right to sell or on the proceeds as such, is immaterial, if in substance and effect, it is actually as much a tax on the goods and on the sale thereof as if it were nominally such a tax. Moreover, it is scarcely accurate, in this case, to say that the tax was not laid on the proceeds as such, for, on the state of facts before the assessors, the only property taxed consisted of such proceeds in the form of cash or deferred payments

(*b*) The second ground above mentioned upon which it was held that the proceeds of the imported goods represented by bills receivable and cash in bank were taxable by the State was that they had become part of the common mass of property within the State and were invested in business here.

We respectfully take issue as to this conclusion. Their identity as the proceeds of the sale of the goods in original packages was never lost. They were transmitted to the plaintiff in error as soon as they were transmissible. The plaintiff in error is a foreign resident, did no other business in the State of New York except the sale of its products in original packages and the collection and remittance of the said proceeds, and there is no proof or assertion that it had any other property in the State than said goods and proceeds outside of office furniture and fixtures. The said proceeds were not invested in the State of New York and did not constitute taxable capital invested in business in said State.

In the opinion of the Court of Appeals (Rec., p. 29) occurs the following:

> " It is true that at one point in its return to the " assessors the relator's agent states that the pro- " ceeds of the sales of the goods are at once re- " mitted to the main office in Dublin, after reserv- " ing the necessary amount for paying the expenses " of the business conducted in the city of New " York. But this is qualified by the subsequent " statement that the amounts of the bills receiv- " able and bank accounts are invested in the city " of New York."

Considerable weight appears to be laid on the statement in the last sentence quoted. The learned Judge who wrote the opinion was evidently under a misapprehension. The plaintiff-in-error nowhere stated in its return to the assessors, which is in the nature of a petition for reduction of the assessment laid upon it, that any part of the notes and open accounts or of the bank account was invested in the City of New York. The return, or, as it is entitled, the " Statement for purpose of Revision," filed by the relator (plaintiff-in-error) with the Board of Tax Commissioners (Rec., p. 5), contains the following: " The following items are true state- " ments showing the amount of capital invested in busi- " ness by the company in the State of New York on the " second Monday of January, 1903." Then follows a statement of the amount of notes and open accounts, the value of goods, wares and merchandise, of safes, fixtures and furniture, the amount of cash on hand and in bank, the cost price of imported goods on hand, and the amount of bills and accounts payable, and at the end it is stated: " The amount invested in busi- " ness in the State of New York was (as shown by Ex- " hibit A hereto attached) $797.68."

This " Statement for Purpose of Revision " was made out under the rules and regulations of the Board of Tax Commissioners and on a blank form furnished

by the Board for the purpose. It is evident that the various items were given, *not* as amount of capital invested, but for the purpose of *calculating* what that amount was." It was so treated by the Tax Commissioners, for in their return to the relator's writ of *certiorari*, it is stated : " It was admitted that the amount " invested in business in this State was $797.68, which " was the value of relator's safes, fixtures and furniture " in this State," and it is also stated in the return : " *We* further determined that the amount receivable " on notes and open accounts, and the cash on hand " and in bank constituted capital of the relator invested " in its business in this State " (Rec., p. 11), so that it appears from the Commissioners' return that the plaintiff-in-error did not admit that the bills receivable and cash on hand was invested in the State, but that such investment was determined by the Board.

On the contrary plaintiff-in-error has always contended, and the Board of Tax Commissioners always understood that its contention was, that the proceeds of the sales of the goods after reserving the necessary amounts for paying duties and other expenses were immediately forwarded to the home office, were only in course of transmission through the State of New York and were never invested there.

The bills receivable, book accounts and cash on hand in question are not money or capital in some permanent form. They produce no income here. They are not taken as investments as notes or mortgages may be taken as security for money invested in loans. They are not retained here for profit in any manner or form. They are employed here for no other purpose than to facilitate the transmission of the proceeds of the sale of the imported goods to their owner. They represent money actually in transition not to be kept here for an indefinite time, but to be transmitted at once as soon as received. The Court below assumes that if the proceeds were transmitted " forthwith " they would not be taxable. Can a sound distinction be based on the fact that the receipt of the proceeds in transmissible form

is deferred, that they are meantime represented by bills receivable or book accounts and that they are transmitted "forthwith" as soon as they are received in the form of money?

THIRD.

As to the business of the plaintiff in error in the State of New York.

It is argued that, because the plaintiff in error procured a certificate authorizing it to do business in the State of New York, and is doing a continuous business in that State by importing and selling goods in original packages, therefore, not only the goods themselves, but the proceeds of the sales of said goods, are, under any and all circumstances, capital employed in business in said State, and, for that reason, although the goods are *not*, the proceeds *are*, taxable, notwithstanding the constitutional prohibitions, and the learned Judge who decided the case at Special Term sustained this contention, holding that the tax here complained of is "not a tax on imports, and not a tax on the sales as such, or on the right to sell goods in the importer's hands while in their original packages. But, when these packages have been sold and have become part of the assets of a person doing business in this State, as in the case of this relator, I think the property must be regarded as having lost its distinctive character as an import, and mixed with the mass of relator's property."

Rec., p. 15.

The reply to this, it is respectfully submitted, is as follows:

1. The fact that the plaintiff in error is doing business in the State of New York is immaterial. Its

claim is that it has received from the United States the right to sell certain goods while in their original packages, *whether said sales are made in the course of that business or not*, and that the State cannot impose a tax, in any form which directly impairs that right, whether the said goods are or are not capital invested in the State, and that the tax on the proceeds of said sale *is* a direct impairment of that right.

That the tax cannot be sustained simply as a tax on business is sufficiently established by *Crandall vs. State of Nevada* (6 Wall., 35), and the other cases cited *supra*, p.

2. The said proceeds are not invested in the State of New York for reasons already given, because they are not converted into something else than money to be paid or employed for profit, or laid out in any permanent form so as to produce an income in that State. The fact that they are partly in cash and partly represented by bills receivable does not alter their character as *uninvested* income. The tax on the proceeds is equally an impairment of the importer's right to sell whether it is laid upon proceeds already received or proceeds to be received. It is, if anything, a greater impairment when laid upon proceeds due, but not collected than if laid upon proceeds already in hand.

3. The bare fact that the proceeds are *assets* of the plaintiff-in-error in New York does not make them capital invested in that State. The plaintiff-in-error is not taxed for all assets or personal property it may have in that State, but only for capital invested therein. Nor does the fact that the plaintiff-in-error carries on business in the State as an importer, and the proceeds of sales in original packages before transmission abroad are part of the assets of that business, make them capital invested in business in the State. The proceeds represent gross income. This may include part of the active capital of the concern, as distinguished from profits, but it is, properly speaking, capital invested in

Dublin, where the plant is situated, the goods are manufactured and the proceeds received and apportioned to capital or to income or dividend account, as the fact may be. But assuming that in a broad sense and by a use of language not strictly accurate the proceeds *could* be said to be invested in business here, and therefore part of the capital of the plaintiff-in-error invested here, simply because their receipt and transmission was an important part of the business of the plaintiff-in-error transacted in the State, they would still constitute a part of the capital of the plaintiff-in-error *not taxable* by the City of New York, but exempt from such taxation, precisely as the capital of the plaintiff-in-error invested in the imported goods themselves in their original packages is, as is admitted, exempted from State taxation. The taxation in question laid upon the proceeds is a tax upon the importer's *right to sell* in original packages free from any tax, except United States duties, and, therefore, unconstitutional whether said proceeds are invested capital or not. This fact makes it immaterial to consider the effect of the decision of the New York Court of Appeals as to the interpretation of the term "capital invested in business" as used in the New York statute. The matter of law to be determined by this Court is whether, on the admitted facts, the proceeds of the imports had become mingled with the common mass of property in the State or invested in the State, in such a manner as to render them taxable by the State without violating the Constitution of the United States, and this question cannot be affected by any interpretation of the New York statute as to capital invested in the State which may be given by the New York Court of Appeals.

FOURTH.

The proceeds in question had not become part of the common mass of the property within the State.

In the case of *Hibernia Savings & Loan Association vs. City and County of San Francisco*, 200 U. S., 310, where the appellant was taxed for checks representing interest on United States bonds, the money drawn on the checks would become part of the general property of a bank situated in San Francisco and the general property of which was there taxable. In this case the appellant is a *non-resident*, the *general property* of which is *not* taxable in the State of New York, and, therefore, it is submitted the doctrine of the case cited does not apply.

The sale of the goods in the original packages is the conversion of said goods into money. The right to make that conversion is the very thing which the Constitution protects. A sale, generally speaking, is nothing else but the conversion of something of value into money paid or to be paid. Therefore, mere conversion of the imported goods which are an asset of the business, into an asset of another form, namely, money paid or to be paid, is not such an incorporation of the proceeds with the general property of the country as renders them subject to the State taxation.

As is well said by Mr. Justice SCOTT in *People ex rel. National Sewing Machine Co. vs. Feitner*, N. Y. Law Journal, March 15, 1899:

> "The open accounts and bills receivable merely
> "stand for and represent the goods which had
> "been sent here for sale. Their taxability de-
> "pends upon whether or not the goods which
> "they represent, if still unsold, would have been
> "taxable. Clearly they would not."

But if that conversion is not such an incorporation in the general property of the country, then no such incorporation takes place. The proceeds are kept wholly separate from the general property of the country nor are they mixed with the mass of the property of the plaintiff-in-error. The only other property the plaintiff-in-error has in this country are the unsold imported goods and office furniture and fixtures. They are mixed with neither of these except in the sense that each species of property has the same owner. They are kept as wholly separate as if they were trust funds, properly kept by the trustee, separate from other property. Indeed, the agent of the plaintiff-in-error *is* a trustee, and if he were sued for an accounting, he could not be required to do more to keep the proceeds of relator's sales, uncommingled with his own or other property, and at all times separate and identifiable, than on admitted facts of this case, he does actually do in collecting, expending and transmitting said proceeds.

FIFTH.

The situs of the bills receivable is immaterial.

The learned Court below refers to *situs* of promissory notes and similar instruments for the payment of money as the place where they are physically held. This is by no means universally true (Metropolitan Life Insurance Co. v. New Orleans, 205 U. S., 395), but in the present case the mere *situs* of the bills receivable, as is submitted, is not material, because the whole question at issue turns, not upon the taxability by the state of the mere *evidence* of the debt represented by said bills receivable, but upon the character of the debt itself as constituting the uncollected price.

SIXTH.

The fact that part of the proceeds represented by deferred payments may be retained and expended for expenses incidental to the original sales or in payment of duties on subsequent importations because duties must be paid in advance of taking the goods out of the Custom House, does not relieve the tax under consideration from its unconstitutional character.

(*a*) So long as the tax is a percentage of the proceeds of the original sale in unbroken packages (and all the property taxed in this case consisted of such proceeds and nothing else), whether a part of such proceeds was reserved for the sole purpose of paying duties or other expenses incidental to the sales, or were promptly sent abroad, does not alter the result. It is still in effect a tax on the proceeds, and, therefore, a tax on the sale, which is the same as a tax on the goods.

(*b*) The money paid for duties and expenses is not invested here, but simply *expended* here, and whether actually expended or engaged to be expended, as bills payable, is not taxed by the State of New York.

On what ground can it he properly claimed that money reserved from the sale of imports in original packages for the sole purpose of paying duties or of paying the expenses incident to the exercise of a non-taxable right of sale of said imports is invested here?

The deduction of bills payable from the amount taxed is an admission that money received and reserved for no other purpose except to meet said bills payable is not invested here. If a sum of money is received in payment for a sale of imports in original packages and

at once remitted abroad, it is admitted that such money is not invested in the State of New York. Now, if part of that money is not forthwith remitted abroad, but is forthwith used to pay duties upon the goods the sale of which produced the remittance—that is, assuming that the sale, the payment of duties and the remittance all occurred on the same day—then it must also be admitted that the money used to pay duties is not invested here. And if, to facilitate matters, the amount required to pay duties is reserved to pay duties on the next shipment imported for sale, the whole proceeds whereof are to be remitted as before, can it be justly argued that the case is essentially different, and that the amount used to pay duties is invested in the one instance and not in the other? And what is true of duties is true of the amount used to meet other expenses necessarily incident to the sale, retained for no other purpose, and not employed for profit. Money merely temporarily on *deposit* here is not *invested* here.

(*c*) Even if the amount reserved for the payment of duties or other incidental expenses should be held taxable, the bulk of the proceeds taxed were in the course of collection and transmission and were delivered at Dublin. The Court below held that if any part of the bills receivable stood in a different position from the rest, it was incumbent on the plaintiff-in-error to point out the error in the assessment. The plaintiff-in-error showed that all the proceeds of the sales of the unbroken packages are at once remitted to the main office at Dublin after reserving the necessary amount for paying the expenses incidental to the sales, and that the greater part of the cash on hand and in bank was in process of transmission to said main office, and that the bank account is, to a very large extent, kept to cover the payment of duties. The plaintiff-in-error claimed that the whole of these proceeds were exempt. The tax was laid on the whole indiscriminately. If it should be held that the amount

reserved was taxable but the rest was not, the assessors should be directed to correct the assessment accordingly, calling upon the plaintiff-in-error for any additional information necessary for that purpose. A tax which includes as to a substantial part thereof property which, by virtue of the prohibition of the Constitution, cannot be taxed by the State, should not be upheld.

Bank Tax Case, 2 Wall., 200.
Home Savings Bank vs. Des Moines, 205 U. S., 503.

SEVENTH.

The judgment brought before this Court by the writ of error should be reversed.

Respectfully submitted,
EDMUND WETMORE,
Counsel for Plaintiff-in-Error.

Office Supreme Court, U. S.
FILED.
NOV 2 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* EDWARD AND JOHN BURKE, Limited,
Plaintiff in Error,

against

JAMES L. WELLS *et al.*, as Commissioners of Taxes and Assessments of The City of New York,
Defendants in Error.

No. 39.

In Error to the Supreme Court of the State of New York.

Brief for Defendants in Error.

The writ of error brings up for review a final order and judgment of the Supreme Court of the State of New York, in and for the County of New York, entered on a remittitur from the Court of Appeals of said State, the highest court of the State in which a decision in this cause could be had.

Writ of Error, p. 26.
Petition for Writ of Error, p. 21.

Statement of Facts.

The present controversy arose from the assessment for taxation in The City of New York, for local purposes,

of capital of a foreign corporation invested in business in the State of New York. The assessment was made under section 7 of the general Tax Law of the State (chapter 908, Laws of 1896), which provided as follows:

> "Non-residents of the state doing business in "the state, either as principals or partners, shall "be taxed on the capital invested in such business "as personal property, at the place where such busi- "ness is carried on, to the same extent as if they "were residents of the state."

Under authority of this law the Commissioners of Taxes and Assessments of The City of New York, pursuant to provisions of the City Charter, assessed the capital of the plaintiff in error for taxation for the year 1903, in the sum of $150,000, which, upon application to them was reduced to the sum of $94,600. The company feeling aggrieved by the assessment brought a proceeding by *certiorari,* under the Tax Law, to review the same. The material facts disclosed by the petition for writ of certiorari in the State court are as follows:

Edward and John Burke, Limited, is and since 1893, has been a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland, and an office in the Borough of Manhattan, City of New York (Petition, p. 2).

It had obtained a certificate authorizing it to do business in the State of New York pursuant to statute (Id.).

After it had been assessed for taxation in 1903 in the sum of $150,000, and within the time prescribed by law, it filed with the Tax Commissioners a verified statement showing the amount of capital invested in the State of New York and the nature of its business (Id., pp. 2, 3).

The assessment as finally made by the Commissioners was upon a valuation of $94,600 (Id., p. 3).

The statement filed with the Commissioners for the purpose of securing a revision of the original valuation disclosed the following particulars ("Schedule A," p. 5):

The amount of capital for which the company was organized was £1,100,000.

Its business in the State of New York was that of importers, and its principal place of business in the State was No. 409 West Fourteenth street, New York City.

Its items of assets in New York State on the second Monday of January were:

Receivable on notes and open accounts	$111,751 53
Goods, wares and merchandise	45,841 21
Safes, fixtures and furniture	796 68
Cash on hand and in bank	6,122 63
Making a total of	$164,512 05

It further appeared that the cost price of imported goods on hand in unbroken original packages was $45,841.21 (the entire amount of "Goods, wares and merchandise" above set forth); and that the amount of bills and accounts payable incurred for items in the sales and assets above enumerated was $24,053.91.

Attached to the statement was a paper marked "Exhibit A" (p. 6), containing certain allegations supplementary to those set forth in "Schedule A" (p. 5). As presenting in brief form the facts on which the petitioner relies for relief we set it forth here in full:

"EXHIBIT A."

"Edward and John Burke, Limited, is a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal place of business in Dublin, Ireland. It is engaged in the business of manufacturing, bottling and selling various liquors and beverages, such as whiskey, stout, etc. It keeps a wareroom and offices in the Borough of Manhattan, to which it sends its products from Ireland in unbroken original packages to be sold. On all these goods it pays duties to the United States. The proceeds of the sales of the goods are at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in The City of New York.

"The value of the goods on hand as shown by the annexed statement, is about the average amount of the goods usually kept here for sale.

"The greater part of the cash on hand and in bank was in process of transmission to the main office. The bank account is, to a very large extent, kept to cover the payment of duties on the goods shipped here for sale.

"The entire amount of bills receivable results from sales of imported goods in unbroken original packages, as does the cash on hand in bank.

"No other business is transacted by the corporation in this State than the sale of its products and the collection and remittance of the proceeds from the same as above stated.

"The corporation has procured a certificate authorizing it to do business in this State."

In concluding its petition in the State Court for writ of *certiorari* to review the assessment complained of, the company alleged that the assessment was illegal in the following particulars (pp. 3, 4):

> "*First*—That on the second Monday of January, "1903, the amounts receivable on notes and open "accounts due your petitioner by its customers was "$111,751.53, and that your petitioner had cash "on hand and in bank amounting to $6,122.63. "That the entire amount of said bills receivable "and cash on hand and in bank resulted from and "was the proceeds of sales by your petitioner of "imported goods in unbroken original packages upon "which your petitioner paid duties to the Govern- "ment of the United States; that in the said as- "sessment of personalty, the amount of said bills "receivable and cash on hand and in bank, viz., "$117,874.16, was included among the assets of "said corporation in this State contrary to law and "the provisions of the Constitution of the United "States.
>
> "*Second*—That on said second Monday of Janu- "ary, 1903, your petitioner had no capital invested "in its business in the State of New York as per- "sonal property, except the sum of $797.68, and that "said sum of $797.68 should have been the assessed "valuation."

(The sum of $797.68 was the alleged value of "safes, fixtures and furniture in the State of New York"—Schedule A, p. 5, subd. 7).

It appears from the return to the writ of *certiorari* in the State Court (p. 11), that the Tax Commissioners determined that the amount receivable on notes and open accounts, and the cash on hand and in bank, as well as safes, fixtures and furniture, were properly assessable

as capital invested in business in the State, and that the assessment should be fixed on the following basis:

Total assets in State		$164,512 05
Deductions:		
Imported goods on hand	$45,841 21	
Bills and accounts payable	24,053 91	
		69,895 12
		$94,616 93

Disregarding the $16.93, the assessment was confirmed at $94,600.

The proceeding was heard at Special Term of the Supreme Court, New York County, upon the petition, writ and return, without additional evidence. No question of form or procedure was involved, nor was the assessment challenged as void. The controversy was heard and decided on the merits, and an order was entered dismissing the writ and confirming the assessment (Order, p. 14; Opinion, p. 15).

The order was affirmed by the Appellate Division of the Supreme Court, First Department (Order, p. 17), and the decision of the Appellate Division was affirmed by the Court of Appeals (p. 1), with an opinion by Chief Judge Cullen (pp. 27-30).

The order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court (Order, p. 19).

Assignment of Errors.

The errors assigned by the plaintiff in error are nominally *five* (p. 25), but practically *two*. They may be indicated by the following propositions:

First—That an assessment for taxation upon proceeds of sale of imported goods in original packages, as shown

by the record in this proceeding, was in effect levying a *tax upon imports* in contravention of Article 1, section 10 of the Constitution of the United States (p. 25, I., II., V.).

Second—That the proceeds of such sales were merely collected here and transmitted abroad, after deducting duties and expenses, and therefore did not constitute *capital invested in business* in the State of New York liable to taxation in The City of New York (p. 25, III., IV.).

ARGUMENT.

I.

The credits and moneys of the plaintiff in error, representing proceeds of sales of its goods within the State of New York, constituted capital invested in business in said State under the provisions of the Tax Law.

As already explained in the statement of facts, the assessment under review was made pursuant to a general statute of the State known as the "Tax Law," whereof section 7 provided for the taxation of "*non-residents* of the state *doing business* in the state," on the "*capital invested* in such *business*," "to the *same extent* as if they were *residents* of the state."

From the fact of the final confirmation of the assessment in this case by the highest court of the State of New York, it will, we assume, be accepted as the law of that State, without argument or citation of other authorities, that cash in hand or in bank and bills and accounts receivable, being the proceeds of goods sold in regular course

of a continuous business, constitute capital invested in such business. The Court of Appeals in its opinion said (p. 28):

> "The relator contends that so far as the last two "items are concerned [cash and receivables], they "do not represent capital employed in this state "within the meaning of our Tax Law, and further "that as they are the proceeds of sales in original "packages, they are not subject to taxation by the "state. *The first contention we will not discuss,* "as we deem the question *settled* by the recent de- "cision of this court in People *ex rel.* Farey & Op- "penheim Company *vs.* Wells (183 N. Y., 264)."

There remains for consideration the Federal question raised by reference to the Constitution of the United States.

II.

The tax imposed upon the credits and moneys representing proceeds of sales did not contravene the provisions of the Federal Constitution.

The only provisions of the Constitution cited by counsel for relator in the State courts, as a basis for exemption from taxation, were as follows:

> Article 1, sec. 10. "No state shall, without the "consent of the congress, lay any imposts or duties "on *imports* or exports, except what may be abso- "lutely necessary for executing its inspection laws."

> Article 1, sec. 8. "The congress shall have "power: * * * sub. 3, to regulate *commerce* "with foreign nations, and among the several states, "and with the Indian tribes."

Under the present assignment of errors reference is made only to Article 1, section 10 (p. 25, I., II.). We assume, therefore, that the claim to relief under the "commerce" clause of the Constitution has been abandoned.

The tax in question is *a tax on property* (City of New York *vs.* McLean, 170 N. Y., 374). *It is a tax levied once a year upon the general mass of property in the State on assessment day.* In the City of New York the date that fixes the status of property for purpose of taxation is the second Monday of January, to which date the allegations of the statement and petition of the relator refer (Schedule A, p. 5, subd. 3).

A consideration of the *nature* of the taxes passed upon by the Supreme Court in Brown *vs.* Maryland (12 Wheat., 419), Cook *vs.* Penn. (97 U. S., 566) and Waring *vs.* Mayor (8 Wall, 110), and of the principles therein enunciated will suffice to show that the tax in question violates neither the letter nor the spirit of Article 1, section 10 of the Constitution.

The statute before the Court in *Brown* vs. *Maryland* required an importer to take out a license and pay fifty dollars *before* he should be permitted to sell a package of imported goods. A penalty was provided for a violation of the statute.

The Court held that an importer upon paying duty on imports to the United States obtained in addition to the right to bring goods into the country the right to sell them without any restriction by a State. The statute requiring the importer to pay a license fee *before he could sell* the imports, it was held to be unconstitutional.

The learned Chief Justice in that case observed that the constitutional prohibition on the States to lay a duty on imports might come in conflict with the acknowledged power of the States to tax persons and property within

their territory, and that the power and the restriction on it might approach so closely as to perplex the understanding. He refrained from attempting to lay down a general rule, saying (p. 441):

> "Yet the distinction exists and must be marked "as the cases arise. Till they do arise, it might "be premature to state any rule as being universal "in its application. It is sufficient for the present "to say, generally that *when the importer has so "acted upon the thing imported that it has become "incorporated and mixed up with the mass of prop-"erty in the country, it has, perhaps, lost its dis-"tinctive character as an import, and has become "subject to the taxing power of the State;* but while "remaining the property of the importer, in his "warehouse, in the original form or package in "which it was imported, a tax upon it is too plainly "a duty on imports to escape the prohibition in the "Constitution."

In *Cook* vs. *Penn.* (97 U. S., 566) the statute required an auctioneer to take out a license and to collect and pay into the State treasury a tax *on his sales* made throughout the year, including sales of imports, thus making the tax one upon each individual *sale* of imported goods made by him. The Court said (p. 573):

> "The tax on *sales* made by an auctioneer is a "tax on the goods sold * * * and when ap-"plied to foreign goods sold in the original pack-"ages of the importer, before they have become in-"corporated into the general property of the coun-"try, the law imposing such tax is void as laying "a duty on imports."

The extent of the constitutional prohibition was, however, most clearly marked by the United States Supreme Court in *Waring* vs. *Mayor*, 8 Wallace, 110. In that case the Court held that where an importer sold imported

goods to another within the State the imports immediately became subject to the taxing power of the State, although the original packages remained unbroken.

The Court has thus declared that under the clause we are considering a State may not tax the *imports* as such; it may not impose a *license tax* upon the importer as a condition precedent to his right to sell; it may not tax the *sales* of imported goods.

When the importer has broken the original packages or sold the goods, the merchandise immediately becomes taxable by the State.

The tax imposed on the assessment in question violates none of the rules established by the highest Court. The value of the imported goods in original unbroken packages was deducted from the total assets, so that there is no tax imposed on *imports* as such. *It is not a license tax that an importer must pay before he can sell nor a tax upon the sales made by him throughout the year.* It is merely the annual tax on a part of the general mass of taxable property in the State.

The relator has a certain average amount of capital invested in business in this State. Part of that investment is in the form of imported goods in original packages. If it is in that form on assessment day, it is exempt from State taxation. If, however, these goods have been sold before assessment day and the investment assumes the form of credits and cash, "it is merely a transformation from one form to another of a sum invested in the State" (Yellow Pine Co. case, 23 App. Div., p. 526), and the investment in that form is taxable the same as any other property invested in business in this State.

The imports represented by the credits and cash had been sold prior to the second Monday of January, 1903. This State had imposed no tax upon them nor upon the sales of them. The rights of the Government had been

fully respected, no tax having been imposed upon the introduction of the imports into the country or upon the incorporation of them with the general mass of property in the State. The interest of the Federal Government in the imports, which was simply that its revenue should not be imperiled, had ceased, and *the imports themselves had become taxable.* Counsel for relator cited no authority supporting or tending to support the theory that credits and cash resulting from the sales of imported goods should be exempt from taxation. We fail to see how an exemption once covering imported goods, but *now lost to even the goods themselves,* can be revived and transferred to another species of property.

Upon the facts here presented the relator is to be treated precisely as if it were a domestic corporation or an individual citizen of the State, transacting a similar business. If a New York merchant imported goods, paid duties thereon and sold for credit, the credits would become taxable personal property under the provisions of our Tax Law (sec. 2, subd. 5), which embraces in the definition of personal property "debts due from solvent debtors, whether on *account, contract,* note, bond or mortgage." And the persons who had purchased the goods from the importer would be entitled to deduct their accounts payable from the value of their personal estate otherwise taxable (Tax Law, sec. 21, subd. 4).

Upon relator's theory the State would receive no benefit whatever in the way of taxation, although the imports had lost their Federal protection.

Counsel for relator in the State courts cited in support of the contention that a tax on the credits and cash in this case was a tax on the imports, one or two cases which arose under the *commerce* clause of the Constitution and not under the *import clause.* In these cases the Supreme Court held that a State Tax upon the *gross receipts of a common carrier,* which was a tax upon each

passenger or each piece of freight carried, was a regulation of interstate commerce and therefore void.

We have endeavored to show that there is no similarity between a tax of this sort and the tax under consideration. The tax in question is not a tax upon *all sales* made throughout the year, nor, indeed, upon sales at all. We do not tax the proceeds of sale as such. The relator may do an extensive business in this State during any year, but only the capital invested in business on the second Monday of January is taxable within the State for local purposes.

The relator is not a common carrier engaged in interstate commerce nor is its business of selling in this State interstate commerce.

The cases cited by relator's counsel are, however, distinguished by the Supreme Court itself in the cases of *Pullman's Car Co.* vs. *Penn.*, 141 U. S., 18, and *Postal Telegraph Cable Co.* vs. *Adams*, 155 U. S., 688, in which it was held that the *instruments of commerce themselves* were subject to a State *property* tax, such as the tax in question.

We submit that relator's credits and monies in this State are not protected from general taxation by the Constitution, and are not exempt from the *tax in question* within the principles of decided cases.

The consideration given to this case by the Court of Appeals, as evidenced by its opinion (pp. 27-30), was careful and thorough, and we respectfully refer to the opinion without here quoting at length. It may be permitted, however, to note that after discussing other matters, the opinion states (p. 28, last paragraph):

> "The real question in this case, therefore, is "whether the property on which the relator has "been taxed, though belonging to a non-resident, "had acquired such a situs within this state as to

"be subject to taxation—a question that does not "depend on the source from which the property was "derived."

And after discussing the question and citing authorities from the reports of this Court, the opinion concluded that as to notes held by the company they were not *in transitu*, and were not for such reason entitled to exemption (p. 30).

On the general question of *situs* of credits of a non-resident corporation for purpose of taxation, the decision and opinion of the Court in *Metropolitan Life Insurance Company of New York* vs. *City of New Orleans*, decided April 8, 1907, may be cited in support of the judgment now under review. While the non-resident corporation was not a *foreign* corporation in the sense that its home office was in a foreign country, the principle of the decision applies equally to the present proceeding, independently of the question of taxation of *imports*.

In concluding the Court said (205 U. S., p. 402):

"We are not dealing here merely with a single "credit or a series of separate credits, but with "a business. The insurance company chose to enter "into the business of lending money within the State "of Louisiana, and employed a local agent to con- "duct that business. It was conducted under the "laws of the State. The State undertook to tax "the capital employed in the business precisely as "it taxed the capital of its own citizens in like "situation. For the purpose of arriving at the "amount of capital actually employed, it caused "the credits arising out of the business to be as- "sessed. We think the State had the power to "do this, and that the foreigner doing business "cannot escape taxation upon his capital by remov- "ing temporarily from the State evidences of

"credits in the form of notes. Under such circum-
"stances, they have a taxable situs in the State of
"their origin."

Cited in *Buck* vs. *Beach*, 206 U. S., 403.

Conclusion.

While the Courts will be astute to defeat any attempt on the part of state legislatures to nullify or impair the provisions of the Constitution of the United States, they will not interfere with the revenue laws of a State unless compelled by some express provision or necessary construction of a higher law. The plaintiff in error does not complain of intentional discrimination, or, indeed, of any discrimination against foreign corporations by the Tax Law under review. The suggestion is, rather, that by enforcing the law an *indirect tax* may be imposed on *imports*, whether the importer be a resident or non-resident of the State.

We respectfully submit that upon the facts presented the possibility of a prohibitive burden upon foreign importations is too remote for serious consideration, and that the order and judgment under review should be affirmed.

Dated New York, October, 1907.

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